# AN ANALYSIS OF SUBSTANTIVE REVIEW IN SINGAPOREAN ADMINISTRATIVE LAW

This article examines the development of substantive review in Singaporean administrative law jurisprudence *vis-à-vis* that of the UK. The study reveals that substantive review in Singapore is relatively underdeveloped due to the conflation between illegality and irrationality review and the reluctance of the courts to adopt proportionality review. It will be suggested that this state of affairs can be best explained by institutional factors as well as the "doctrine" of judicial deference. While this article will not consider the desirability of these autochthonous developments, two small proposals for reform of the law will be suggested.

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## I. Introduction

1 It can no longer be said that there is little interest in administrative law in Singapore. Recent years have seen a number of high-profile cases on judicial review[1] and a spurt of academic discourse on the topic.[2] Moreover, in an extra-judicial lecture at the Singapore Management University in 2010, the then Chief Justice Chan Sek Keong noted the students' "sense of unease about the dormant state of judicial review in Singapore".[3] This "angst",[4] as the Chief Justice called it,

* The author would like to thank the anonymous referee for his or her helpful comments. All errors and infelicities of style are his own. S.d.g.

1 *Eg*, *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189; *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872; *Vellama d/o Marie Muthu v Attorney-General* [2012] 2 SLR 1033. Admittedly, these cases deal strictly with constitutional law matters, but the means of challenge – judicial review – is the same as in administrative law. Nevertheless, it is clarified that hereinafter the term "judicial review" will be used interchangeably with "administrative law"; in other words, as a helpful shorthand for "judicial review of administrative action".

2 *Eg*, Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469; Thio Li-ann, "The Theory and Practice of Judicial Review of Administrative Action in Singapore" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Academy Publishing, 2011) <http://nus.academia.edu/LiannThio/Papers/971945/The_Theory_and_Practice_of_Judicial_Review_of_Administrative_Action_in_Singapore_Trends_and_Perspectives> (accessed 18 February 2013).

3 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at [2].

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portends – if anything – a burgeoning interest in judicial review in Singapore.

2 This article focuses on one aspect of administrative law in Singapore: substantive review. The analysis is structured as follows. The article first considers the origins of substantive review in English administrative law[5] and how it has developed subsequently in light of the Human Rights Act 1998,[6] taking special care to distinguish substantive review from the other grounds of judicial review – especially illegality review.[7] Thereafter, the attention turns to substantive review in Singapore[8] and how it has taken a different route in its development: irrationality review has become conflated with illegality review, rendering the former a blunt tool,[9] and proportionality review has yet to be adopted.[10] Indeed, the study reveals that little is done by way of *true* substantive review in Singapore (that is, substantive review is underdeveloped). The implications of these developments will then be considered[11] and a few explanations will be proffered for this current state of affairs.[12] In particular, the article considers the probable adoption of a "doctrine" of judicial deference[13] by the courts – a development that must be viewed with caution. Finally, the article concludes with two small proposals for reform of the law, which would aid conceptual clarity in judicial review.[14]

3 The focus on substantive review also serves a secondary purpose. Judicial review of administrative acts for procedural matters is generally uncontroversial; it is largely agreed upon that the courts should intervene and quash on grounds of, for example, natural justice or bias. The extent of the courts' power to interfere with an administrative decision on *substantive* grounds, however, is far less clear-cut; after all, judicial review is premised on the orthodoxy that it is review on the basis of the *legality* of a decision rather than its *merits*. It is therefore contended that an examination of how substantive review has developed would reveal more clearly the judicial attitudes towards judicial review. Indeed, the principles of administrative law owe themselves largely, if not solely, to judicial development.

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5 See paras 8–13 below.
6 c 42 (UK).
7 See paras 18–23 below.
8 See paras 25–32 below.
9 See paras 33–44 below.
10 See paras 25–28 below.
11 See paras 45–61 below.
12 See paras 62–70 below.
13 Whether judicial deference should be recognised as a standalone "doctrine" of administrative law is open to debate. See further the text accompanying n 112 below.
14 See paras 71–74 below.

## II. What is substantive review? – Lessons from the UK

4 It is trite law that judicial review of administrative action seeks to review the legality and not the merits of the administrative decision. In other words, the court's judicial review jurisdiction is not an *appellate* one. This distinction between legality and merits is premised on the doctrine of *ultra vires* – the "juristic basis of judicial review"[15] – which posits that all administrative power must be exercised within legal limits. Therefore, the powers of a (statutory) public body are delineated by the Act of Parliament which constitutes it, and the role of the courts in judicial review is to interpret such legislation, ascertaining whether the challenged administrative decision is indeed *ultra vires* [beyond the powers].

5 However, it is often the case that Parliament, in granting power to the administrative decision-maker, accords him a margin of discretion as well. In such cases, whether the decision is *ultra vires* or not might depend on considerations beyond legality *simpliciter*; here, contrary to the orthodoxy stated above, judges are drawn into questions regarding the merits or substance of the decision. Indeed, administrative decisions have long been subject to scrutiny on grounds of substance, where said decisions flagrantly breach a high standard of unreasonableness (irrationality review) or, more recently, where such decisions are found to be disproportionate (proportionality review). However, before these specific grounds of substantive review are considered below, it would be helpful at this juncture to consider an illustration.

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15 *Boddington v British Transport Police* [1993] 2 AC 143 at 164, *per* Lord Browne-Wilkinson. This article will not be drawn into the debate on whether the doctrine of *ultra vires* is the constitutional foundation for judicial review. It suffices to say that while the traditional *ultra vires* theory is problematic, not least in explaining the judicial review of non-statutory bodies (see Dawn Oliver, "Is the *Ultra Vires* Rule the Basis of Judicial Review?" [1987] PL 543; Paul Craig, "*Ultra Vires* and the Foundations of Judicial Review" (1998) 57 CLJ 63), a modified version of the *ultra vires* theory, which retains a role for legislation, resolves these difficulties satisfactorily (see Mark Elliott, "The *Ultra Vires* Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" (1999) 58 CLJ 129 and Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, 2001)). While this "modified" *ultra vires* model was developed in the British constitutional context to accommodate for Parliamentary sovereignty, Thio Li-ann has suggested that a variant of the *ultra vires* theory is applicable in the Singapore context where the Constitution is supreme: "The Theory and Practice of Judicial Review of Administrative Action in Singapore" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Academy Publishing, 2011) at para 91. The limited scope of this article precludes a full development of a constitutional theory of judicial review in Singapore. For the purposes of the argument, however, Thio's view of a modified *ultra vires* theory adapted to the context of constitutional supremacy shall be adopted as the basis for judicial review in Singapore.

6 Consider this fictional scenario: Parliament enacts the (imaginary) Air Pollution Act, which gives the Minister for Environment discretion to develop policies to reduce Singapore's carbon footprint. He then passes secondary legislation purporting to ban all outdoor barbecues as, in his considered judgment, this would be a significant step towards reducing carbon emissions. Assume that the Minister is acting completely within the statutory powers granted him. His plan is announced; there is huge public outcry ("how else are we to obtain our chargrilled meats?"). The Minister's policy does seem ludicrous, not least because he does not seem to direct any attention to carbon emissions from cars and other vehicles. Indeed, the decision might have political ramifications both for himself and the ruling party. Yet, is it challengeable *in law*? Specifically, notwithstanding that the Minister's decision is *intra vires*, can it still be challenged by way of judicial review? If so, on what grounds?

7 The short answer is "yes". Provided that the applicant for judicial review has the requisite standing,[16] he could challenge the decision on grounds of *substance*. This is the essence of substantive review. In the UK, this takes the form of irrationality review and proportionality review, which will now be considered in turn.

### *A. "Irrationality" or* Wednesbury *unreasonableness*

8 In his seminal judgment in *In re the Council of the Civil Service Unions* ("*GCHQ*"),[17] Lord Diplock recognised the head of review for irrationality or *Wednesbury*[18] unreasonableness: a decision could be quashed where it was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".[19] That is, a decision could be quashed on the basis of its substance where it was so *unreasonable* that no *reasonable* authority could have come to it, such as where a teacher is dismissed solely on account of her red hair.[20] Crucially, however, in considering whether a decision is irrational, the court persistently guards against substituting its own view of what is reasonable for that of the decision-maker. This prevents the judge from usurping what Parliament has delineated to be the rightful role of the

16 In our imaginary scenario, a likely applicant would be a company that provides ready-made barbecue supplies – skewered meats, charcoal and so on.

17 [1985] AC 374 (HL); the case was described as the "*locus classicus* of a modern public law": Sir Louis Blom-Cooper & Richard Drabble, "*GCHQ* Revisited" [2010] PL 18.

18 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

19 *In re the Council of the Civil Service Unions* [1985] AC 374 (HL) at 410.

20 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, *per* Lord Greene MR.

decision-maker and underlies the orthodoxy of judicial review as being premised on review for legality and not merits.

9 As in other areas of the law,[21] what is reasonable depends on the context. As Sir John Laws observed:[22]

> On the surface at least the test of unreasonableness or irrationality … is monolithic; it leaves no scope for a variable standard of review according to the subject-matter of the case … But in fact the courts, while broadly adhering to the monolithic language of *Wednesbury*, have to a considerable extent in recent years adopted variable standards of review.

10 Laws gave examples to illustrate this variable standard of review. In *Nottinghamshire City Council v Secretary of State for the Environment*,[23] a higher threshold of unreasonableness was required to review a decision of a Minister, which had previously been endorsed by a resolution of the House of Commons. Conversely, in *R v Secretary of State for the Home Department ex parte Brind*[24] ("*Brind*"), a lower threshold of unreasonableness (corresponding to a greater standard of review) was required where the fundamental right to freedom of expression was engaged.

11 The variable standard of review depends generally on two factors, illustrated by the case of *R v Secretary of State for Defence ex parte Smith*.[25] The applicants here had been dismissed from the British armed forces on the sole ground that they were of homosexual orientation. The decisions to discharge them were based on a policy of the Ministry of Defence, which had been debated in both houses of Parliament and considered by select committees of the House of Commons. In applying the test of irrationality, Sir Thomas Bingham MR (as he then was) identified two key considerations. First, whether fundamental human rights were interfered with. Approving the submissions of counsel, he held:[26]

> The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. *The more substantial the*

21 *Eg*, the tort of negligence, where the standard of care is that of the "reasonable" man or, more imaginatively put, "the man on the Clapham omnibus".

22 Sir John Laws, "*Wednesbury*" in *The Golden Metwand and the Crooked Cord* (Christopher Forsyth & Ivan Hare eds) (Oxford University Press, 1998).

23 [1986] AC 240.

24 [1991] 1 AC 696.

25 [1996] QB 517.

26 *R v Secretary of State for Defence ex parte Smith* [1996] QB 517 at 554.

> *interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.* [emphasis added]

12 The second factor – the policy content of the decision – was described two pages later:[27]

> *The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational.* That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations. [emphasis added]

13 In applying the test of irrationality, therefore, the courts must weigh up both the fundamental rights of the applicants and the policy nature of the decision (namely, multifaceted issues that the courts might not be suited to handle). On the facts, however, while the interference with the applicants' human rights necessitated a higher standard of review, their application for judicial review was unsuccessful – the Court of Appeal held that the decision was *not* irrational.[28]

### *B. Proportionality review*

14 As such, it became apparent that irrationality review was still inadequate to truly safeguard fundamental rights despite the lower threshold of unreasonableness required in such cases. The English courts also faced pressures from the European Court of Human Rights ("ECtHR") in Strasbourg. As a party to the European Convention of Human Rights[29] ("the Convention"), a British claimant could assert his rights before the ECtHR if he had been unsuccessful in doing so before the domestic courts, often with a reasonable degree of success.[30]

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27 *R v Secretary of State for Defence ex parte Smith* [1996] QB 517 at 556.

28 The applicants were, however, successful before the European Court of Human Rights (*Smith v United Kingdom* (2000) 29 EHRR 493), which considered that the test of irrationality was placed at too high a threshold "that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued" (at [138]). In other words, the test of irrationality did not meet the standard of proportionality review applied by the European Court. See further at para 14 *ff* below.

29 Formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms; entered into force on 3 September 1953.

30 Contrast the outcomes of the Court of Appeal decision in *R v Ministry of Defence, ex p Smith* and the European Court of Human Rights in *Smith v United Kingdom*. See also n 28 above.

Therefore, shortly after the enactment of the Human Rights Act 1998,[31] the House of Lords in *R (Daly) v Secretary of State for the Home Department*[32] incorporated the test of proportionality into English law, to be applied where parties' Convention rights were engaged.

15 Proportionality is a commonplace concept in European jurisprudence, originating from the German legal tradition and adopted by both the ECtHR in Strasbourg and the Court of Justice of the European Union in Luxembourg. In deciding whether an administrative measure is indeed proportionate, the court should ask itself the following five questions:[33]

> (a) Does the measure impinge upon a highly regarded interest (for example, a human right)?
>
> (b) Does the measure pursue a legitimate objective?
>
> (c) Is the measure capable of securing that objective?
>
> (d) Is the adoption of the measure necessary in order to secure that objective?
>
> (e) Are the losses inflicted by the measure (for example, in terms of the restriction of human rights) justified or outweighed by the gains that it purchases (for example, in terms of benefits that flow from securing the legitimate objective)?

16 In short, proportionality review requires the weighing up of two factors: first, necessity (is the measure *necessary* to achieve the legitimate aim identified?); and second, suitability (is the measure *suitable* to achieve the said aim, where the gains are weighed up against the losses caused by it?). Proportionality review therefore requires the courts to apply a more intrusive standard of review than irrationality. Instead of merely asking whether an administrative measure adopted falls within the range of reasonable responses by a decision-maker (as under *Wednesbury*), the courts are to engage in a balancing act, analysing the substance of the decision to ascertain if the measure is proportionate.

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31 The Human Rights Act 1998 (c 42) (UK) incorporated certain rights in the European Convention of Human Rights into domestic law (see Sched 1). It was intended by the then Labour government to "bring rights home". See further the UK Government White Paper: Home Office, "Rights Brought Home: The Human Rights Bill" (Cm 3782) (October, 1997).

32 [2001] UKHL 26.

33 Adapted from Mark Elliott, "Proportionality and Deference: The Importance of a Structured Approach" in *Effective Judicial Review: A Cornerstone of Good Governance* (C F Forsyth, Mark Elliott & Swati Jhaveri eds) (Oxford University Press, 2010). He formulated these five questions based on the Privy Council decision in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 and the House of Lords decision in *Huang v Secretary of State for the Home Department* [2007] UKHL 11.

Proportionality review therefore undermines the legality/merits orthodoxy of judicial review – the main reason why the House of Lords in *Brind*[34] expressed reluctance to adopt it prior to the enactment of the Human Rights Act 1998.

17 Review for proportionality is at present confined to two main areas: cases where rights under the Human Rights Act 1998 are engaged (as explored above); and cases dealing with European Union law. Proportionality was also raised in the case of *Nadarajah Abdi v The Secretary of State for the Home Department*,[35] Laws LJ considering *obiter* that a public body could renege from a *prima facie* legitimate expectation where it was proportionate to do so, "having regard to a legitimate aim pursued by the public body in the public interest".[36] However, this was an isolated case and it must be stressed that proportionality is not as yet a general head of review in UK law. Indeed, despite the adoption of proportionality – with its more intrusive standard of review – irrationality remains relevant outside these aforementioned contexts. The Court of Appeal in *The Association of British Civilian Internees – Far Eastern Region v Secretary of State for Defence*[37] refused to "perform its burial rites",[38] and it has continued to be pleaded before the administrative courts in the UK.[39] Indeed, some commentators consider that irrationality should be retained alongside proportionality[40] for generally two reasons. First, while the structured nature of proportionality review lends itself easily to a rights-based analysis – weighing up the rights of the individual against the legitimate public aim – not all cases readily fit within this scheme, for example, where the government has failed to take a measure or where a public servant is wrongfully dismissed. In such cases, the more amorphous nature of *Wednesbury* would more readily apply. Second, unless fundamental rights are engaged, it might not be normatively legitimate to invoke the intrusive standard of proportionality review; irrationality provides an adequate standard of review in these cases. It appears therefore that irrationality review will continue to persist alongside proportionality review for the foreseeable future.

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34 *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696. See especially 764–767 (*per* Lord Lowry) and 757–759 and 762–763 (*per* Lord Ackner).

35 [2005] EWCA Civ 1363.

36 *Nadarajah Abdi v The Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68].

37 [2003] QB 1397.

38 [2003] QB 1397 at 1413.

39 For a recent case where irrationality was successfully pleaded, see *R (on the application of Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157 (CA).

40 See further Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing, 2010), especially ch 9; Michael Taggart, "Proportionality, Deference, *Wednesbury*" [2008] NZ L Rev 42; Paul Craig, *Administrative Law* (Sweet & Maxwell, 2008) at para 21-025 *ff*.

### *C. Substantive review distinguished from illegality review*

18 Substantive review therefore refers to the twin doctrines of irrationality and proportionality, both of which act to scrutinise the *substance* of the administrative decision by analysing the reasoning employed or the justifications proffered by the decision-maker. At this juncture, however, it would be apt to distinguish substantive review from illegality review. The distinction is crucial, as shall be seen below.[41]

19 In the *GCHQ* case, Lord Diplock also[42] identified the head of review of illegality. This entails that the "decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it".[43] In other words, illegality review is concerned with the *vires* of a decision-maker – the authority allocated to him under the law to make the decision in question. This has subsequently[44] been taken to refer to the doctrines of "propriety of purpose"[45] and "relevancy of considerations",[46] which are summarised respectively by these two propositions:

> (a) where Parliament has conferred a discretion on a decision-maker, the decision-maker must exercise this discretion in *good faith* and in accordance with the *proper statutory purpose* envisaged by the Act of Parliament ("propriety"); and
>
> (b) when making this decision, the decision-maker must *neither* take into account *irrelevant considerations*, *nor* fail to take into account *relevant* considerations ("relevancy").

20 As Jowell and Lester explained:[47]

> By separating irrationality from illegality, [Lord Diplock in *GCHQ*] made the point that even though a decision may be legal (in the sense of being within the scope of the legislative scheme), it may nevertheless be substantively unlawful. In other words, he recognised that the courts may strike down a decision because it offends

41 See paras 33–44 below, which explores how the Singapore courts have conflated both doctrines of review.

42 Lord Diplock identified the heads of review for illegality, irrationality and procedural impropriety, and foresaw that proportionality might be seen as a further head of review in the future.

43 *In re the Council of the Civil Service Unions* [1985] AC 374 (HL) at 410.

44 See, *eg*, Lord Harry Woolf, Jeffrey Jowell & Andrew Le Sueur, *De Smith's Judicial Review* (Sweet & Maxwell, 2007).

45 See, *eg*, *Roberts v Hopwood* [1925] AC 578; *R v Somerset County Council ex parte Fewings* [1995] 1 WLR 1037.

46 See, *eg*, *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

47 Jeffrey Jowell & Anthony Lester, "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] PL 368 at 369.

> substantive principles, independent of those provided for by the statute in question.

Therefore, even where an administrative decision is made *intra vires* (illegality review), the courts retain a residual layer of review to scrutinise the actual *exercise* of discretion by the decision-maker (irrationality or proportionality review).

21 Illegality and substantive review are therefore conceptually distinct. Yet, certain features of illegality review lend it readily to confusion. A couple of points must be raised at this juncture to allow for the theme to be developed further below.[48] First, it should be noted that the language of illegality is infelicitous. In one sense, where any of the grounds of review are successfully pleaded, the administrative act in question is "illegal" (or "unlawful"). Thus, even though an administrator may very well be adhering to the proper statutory purpose, taking into account relevant considerations and eschewing irrelevant considerations in the decision-making process, the final decision could be found illegal for being in breach of natural justice or, indeed, for being irrational (*Wednesbury* unreasonableness). Put another way, the language of illegality could be mistakenly construed as a general notion of unlawfulness. The reader is thereby cautioned *not* to construe illegality beyond its technical sense as defined above; whenever illegality is referred to in this article, it is with this narrow sense of *vires* in mind.[49]

22 Second, closer scrutiny of the *Wednesbury* case itself sheds more light on the potential for conflation of illegality and irrationality reviews. In developing the notion of *Wednesbury* unreasonableness, Lord Greene MR considered the colourful example of the dismissal of a red-haired teacher simply because she had red hair. Fundamentally, it should be noted that the unreasonableness in his example can be seen as the taking into account of an irrelevant consideration (her red hair), or the exercise of a power in bad faith or for improper purposes (to discriminate against red-haired teachers). In this vein, review for irrationality and illegality appear to blur into each other.[50] Craig

48 See paras 33–44 where the conflation of illegality and irrationality reviews in Singapore is examined, and paras 45–61 where the implications of this conflation are discussed.

49 Why then, persist with the language of "illegality" in this article, in light of its propensity to obfuscate the analysis? This is because the Singapore courts have persisted with its usage: *eg*, *Lim Mey Lee Susan v Singapore Medical Council* [2011] 4 SLR at [15], *per* Philip Pillai J, where "illegality" is used interchangeably with "*ultra vires* the enabling law"; *Mir Hassan bin Abdul Rahman v Attorney-General* [2009] 1 SLR(R) 134 at [14] where Tan Lee Meng J equated illegality with "a situation where an act is done without legal authority". It is suggested that this has the potential to exacerbate the doctrinal confusion of illegality and irrationality (see further paras 29–32 below).

50 Which Lord Greene himself recognised in *Wednesbury* at 229.

cautioned against this. He noted[51] that the unreasonableness that Lord Greene MR referred to has two meanings: first, an umbrella sense that encompasses irrelevant considerations, improper purposes and *mala fides*; and second, a substantive sense where a decision may be attacked if it is so unreasonable that no reasonable public body could have made it. The role of unreasonableness in its substantive sense (namely, "irrationality") was conceived of in *Wednesbury* as a "safety net"[52] to be used after tests such as relevancy or purpose.

23 To conclude this section, the example considered earlier[53] shall be revisited. The Minister for Environment has adopted secondary legislation banning outdoor barbecues. He is empowered by an Act of Parliament to develop policies to reduce carbon emissions. Accordingly, as he has acted within his statutory powers, his decision cannot be impugned on grounds of illegality. However, his decision may be reviewed on substantive grounds: it may be found to be *irrational* (a blanket ban on outdoor barbecues can be seen to be manifestly unreasonable in light of other measures open to him); or *disproportionate* (the measure taken is neither suitable nor necessary to achieve the desired aim). Admittedly, this example is rough and unrealistic, but it illustrates the central proposition – even where an administrative decision is made *intra vires* (illegality review), the courts retain a residual layer of review to scrutinise the actual *exercise* of discretion by the decision-maker (irrationality or proportionality review).

## III. The development of substantive review in Singapore

24 With the groundwork laid in place, it is now appropriate to chart the development of substantive review in Singapore administrative law. Proportionality review shall first be discussed, followed by the development of irrationality review in Singapore.

### *A. Proportionality review in Singapore*

25 This section can be dealt with briefly: proportionality review has yet to be adopted by the Singapore courts. In 1988, the Court of Appeal in *Chng Suan Tze v Minister for Home Affairs*[54] ("*Chng Suan Tze*") held that it "ha[d] not been established as a separate ground of review".[55]

51 Paul Craig, *Administrative Law* (Sweet & Maxwell, 2008) at para 17-002.
52 Paul Craig, *Administrative Law* (Sweet & Maxwell, 2008) at para 17-002.
53 See para 6 above.
54 [1988] 2 SLR(R) 525.
55 [1988] 2 SLR(R) 525 at [121].

Indeed, the court thought that it could be subsumed under irrationality:[56]

> If a decision on the evidence is so disproportionate as to breach this principle, then in our view, such a decision could be said to be irrational in that no reasonable authority could have come to such a decision.

26 More recently, in *Chee Siok Chin v Minister for Home Affairs*, V K Rajah J said:[57]

> Another fundamental difference now existing between English law and Singapore law is the applicability of the notion of proportionality. This is very much a continental European jurisprudential concept imported into English law by virtue of the UK's treaty obligations … Proportionality is a more exacting requirement than reasonableness and requires, in some cases, the court to substitute its own judgment for that of the proper authority. Needless to say, the notion of proportionality has never been part of the common law in relation to the judicial review of the exercise of a legislative and/or an administrative power or discretion. Nor has it ever been part of Singapore law.

27 This resistance to proportionality review probably stems from the concern of the Singapore judges not to overstep the boundaries of their supervisory jurisdiction, much like their British counterparts in *Brind*.[58] Thus, the Court of Appeal in an earlier decision of *Chan Hiang Leng Colin v Minister for Information and the Arts*[59] considered that there was "very little room (if any) left for any doctrine of proportionality (assuming it exists) to apply", at least in the national security context.[60] Indeed, "[t]o apply any higher test than the *Wednesbury* test would necessarily involve the court in a decision on the merits" amounting to a "usurpation of power and responsibility that rightly belongs to the Minister".[61]

28 The Singapore courts have therefore been reluctant to adopt proportionality review. The implications of this development (or, more accurately, the lack thereof) will be seen below.

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56 [1988] 2 SLR(R) 525 at [121]. It would appear that the Court of Appeal did not conceive of proportionality as a structured test, balancing between the necessity and suitability of a measure.

57 [2006] 1 SLR(R) 582 at [87].

58 See paras 14–17 above.

59 [1996] 1 SLR(R) 294.

60 [1996] 1 SLR(R) 294 at [44].

61 *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [44].

### *B. Irrationality in Singapore – A context-dependent standard of review*

29 On the other hand, the doctrine of irrationality (or *Wednesbury* unreasonableness) has been imported into judicial review in Singapore. Like its UK counterpart, it is a context-dependent standard of review. The recent decision of *Re Wong Sin Yee*[62] is illustrative.

30 The case concerned a challenge to an order for detention without trial under the Criminal Law (Temporary Provisions) Act[63] ("CLTPA"). The applicant, Wong Sin Yee, was alleged to be the boss of an international drug syndicate, but, controversially, instead of being tried by a court, he was detained preventively under the CLTPA. He thus sought judicial review of the Minister of Home Affairs' decision to detain him under the CLTPA on grounds of *inter alia* irrationality. He argued that it was irrational on two counts: first, that based on the evidence of his financial standing he could not have been the boss of the alleged drug syndicate; and second, that he should be tried in open court rather than detained under the scope of the CLTPA.[64]

31 Tan Lee Meng J first clarified the legality of detention orders under the CLTPA: all that was required was ministerial satisfaction that the detainee was associated with criminal activities and warranted detention in the interests of "public safety, peace and good order" in Singapore.[65] Turning to review for irrationality, he adopted a deferential attitude towards ministerial discretion. He considered that the Court of Appeal's observation in the earlier case of *Chng Suan Tze* – that "[i]t hardly needs any emphasis that the judicial process is unsuitable for

62 [2007] 4 SLR(R) 676.

63 Cap 67, 2000 Rev Ed. Michael Hor ("Law and Terror: Singapore Stories and Malaysian Dilemmas" in *Global Anti-Terrorism Law and Policy* (Victor V Ramraj, Michael Hor & Kent Roach eds) (Cambridge University Press, 2005)) noted that this was originally enacted as the Criminal Law (Temporary Provisions) Ordinance 1955 (SS Ord No 26 of 1955), when Singapore was still a crown colony of the British empire. Communist insurgency led the British to proclaim a state of emergency in 1948, and the Criminal Law (Temporary Provisions) Ordinance 1955 was amended in 1958 to allow for preventive detention without trial. Although originally intended to be a temporary measure, it has been renewed continuously and the validity of the act was most recently extended for five years from 21 October 2009 (Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) s 1(2)).

64 The Government stressed that the main reason for preventive detention was the inability of the authorities to secure the testimony of witnesses and accomplices for trial. Counsel for Wong argued that he had indeed named certain persons who would be able to testify, some of whom were already in custody or abroad (*Re Wong Sin Yee* [2007] 4 SLR(R) 676 at [47]).

65 *Re Wong Sin Yee* [2007] 4 SLR(R) 676 at [21].

reaching decisions on *national security*" [emphasis added][66] – applied to the immediate context of "public safety, peace and good order" as well. Accordingly, this warranted only a minimal level of judicial review, and in light of the evidence available, the judge held that he was "in no position to hold that … the Minister's exercise of discretion was irrational in the *Wednesbury* sense".[67]

32 The judgment may be analysed as follows. At stake in this case was Wong's right to liberty – a fundamental right that corresponded to a lower threshold of unreasonableness required for a finding of irrationality. On the other hand, however, Tan J found that the case impinged matters of national security, this context warranting a higher standard of unreasonableness. On the balance, Tan J could not hold that the decision was *Wednesbury* unreasonable, choosing to defer to the Minister's judgment.[68]

### *C. The conflation of irrationality and illegality in Singapore*

33 Irrationality and illegality have been distinguished above,[69] but it bears repeating: even where an administrative decision is made *intra vires* (illegality), the courts retain a residual layer of review to scrutinise the actual *exercise* of discretion by the decision-maker (irrationality). The Singapore courts have, unfortunately, conflated review for illegality and irrationality. The following three cases demonstrate this conflation.

34 The first, *Attorney-General v Venice-Simplon Orient Express Inc Ltd*[70] ("*Venice-Simplon*"), concerned the exercise of discretion by the Registrar of Trade Marks. Two companies sought to register trade marks that were identical in nature or nearly resembled each other. The Registrar refused to register either of them and wrote to the solicitors of both companies, stating that she would deem the application as abandoned if she did not hear from them within three months. The solicitors for the first company, Ella Cheong & G Mirandah ("Ella Cheong"), subsequently applied for and obtained various extensions of time. On the other hand, the solicitors for the second company, Drew & Napier, failed to take any action until several months after the expiry of the deadline. When they finally applied for an extension, they were

66 *Re Wong Sin Yee* [2007] 4 SLR(R) 676 at [46], citing *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [12].

67 *Re Wong Sin Yee* [2007] 4 SLR(R) at [46].

68 It should also be noted that at play here was a general doctrine of non-justiciability – this is discussed at Part IV below.

69 See paras 18–23 above.

70 [1995] 1 SLR(R) 533; see also Thio Li-ann, "Law and the Administrative State" in *The Singapore Legal System* (Kevin Tan ed) (Singapore University Press, 2nd Ed, 1999) at p 186, where she also noted this conflation.

rejected by the Registrar, who had a discretion under s 78 of the Trade Marks Act[71] to extend the deadline.

35 Drew & Napier applied successfully for judicial review to quash the Registrar's decision. It was held by the Court of Appeal that the Registrar had taken into account irrelevant considerations in making her decision: she had cited in her reasoning their past conduct (it was "not the first time Drew & Napier had failed to request for an extension of time in a similar situation")[72] and "administrative convenience".[73] The court also held that she had failed to take into account that Drew & Napier were only four days late, and had they been on time they would have been automatically granted this extension. Further, she failed to consider that at this time the extension obtained by Ella Cheong was in effect, with the result that Drew & Napier's clients were "grave[ly] prejudice[d]" *vis-à-vis* Ella Cheong's clients.[74] The court then concluded:[75]

> Failure to recognise and give due consideration to this and being influenced by irrelevant considerations and failing to take into account relevant matters made the exercise of her discretion improper and in that sense irrational in the sense spoken of by Lord Diplock in the [*GCHQ*] case.

36 With respect, the Court of Appeal appears to have conflated the heads of review for "irrationality" and "illegality". Similar comments were made by the court in the recent case of *Lim Mey Lee Susan v Singapore Medical Council*[76] ("*Lim Mey Lee Susan*"). The applicant, Dr Susan Lim, sought judicial review of the decision of the Singapore Medical Council ("SMC") to appoint a second disciplinary committee to continue the disciplinary proceedings of the first disciplinary committee to which she was subject. The first disciplinary committee had earlier been recused.[77] She argued that this decision was irrational on the basis of substantive issues such as the evidence before the first disciplinary committee, the absence of any rule regulating the quantum of fees that a doctor may charge a patient and other reasons detailed in

71 Cap 332, 1992 Rev Ed.

72 *Attorney-General v Venice-Simplon Orient Express Inc Ltd* [1995] 1 SLR(R) 533 at [11].

73 *Attorney-General v Venice-Simplon Orient Express Inc Ltd* [1995] 1 SLR(R) 533 at [22].

74 *Attorney-General v Venice-Simplon Orient Express Inc Ltd* [1995] 1 SLR(R) 533 at [22].

75 *Attorney-General v Venice-Simplon Orient Express Inc Ltd* [1995] 1 SLR(R) 533 at [22].

76 [2011] 4 SLR 156.

77 Dr Lim had been subject to disciplinary proceedings for charges related to overcharging a member of the Bruneian royal family in medical bills. The first committee was recused after Lim complained that they had prejudged her case of "no case to answer".

the written submissions before the first committee. Philip Pillai J considered that:[78]

> A decision will only be considered *irrational* if the administrative body in question took into consideration matters that it should not have taken into account, failed to take into consideration matters which it was bound to consider or if the decision was so absurd that no reasonable body could have made such a decision. [emphasis added]

37 From this dictum alone it appears that Pillai J considered the test of irrationality to be satisfied even where irrelevant considerations were taken into account (that is, where the test of relevancy was satisfied). However, his conclusion further confirms the court's conflation of irrationality and illegality. On the facts, Pillai J held that the decision was *not* irrational for two reasons. First, since the SMC decision was not a decision that touched on the substance or merits of the complaint, it did not consider irrelevant considerations nor fail to consider relevant considerations. Second, it would be "hypothetical and premature"[79] to say that *any* disciplinary committee decision against Dr Lim *would be* irrational.

38 It is clear from the above two cases how the Singapore courts have conflated review for irrationality with that of illegality; in particular, the test of relevancy of considerations, *sensu stricto* part of illegality review, appears to supplant (or at least prove an alternative to) the original formulation of *Wednesbury* unreasonableness. The third case, *City Developments Ltd v Chief Assessor*[80] ("*City Developments*"), further illustrates the nature of this conflation. Under s 4(2) of the Property Tax Act,[81] the Chief Assessor is responsible for assessing the annual values of properties for the purposes of valuing property tax. The Property Tax Act defined a number of ways in which the annual value could be assessed. In the present case, two methods were applicable: first, "the hypothetical tenancy method" under s 2(1) of the Property Tax Act;[82] and second, "the 5% method" under s 2(3)(*b*) of the same Act. The applicant, property developer City Developments Ltd ("CDL"), challenged the Chief Assessor's decision to adopt the 5% method instead of the hypothetical tenancy method when valuing a piece of property held by CDL. This change translated to an increase of $122,400 of property tax payable on the property.

78 *Lim Mey Lee Susan v Singapore Medical Council* [2011] 4 SLR 156 at [73]. This was subsequently approved by the Court of Appeal at *Lim Mey Lee Susan v Singapore Medical Council* [2012] 1 SLR 701 at [12].

79 *Lim Mey Lee Susan v Singapore Medical Council* [2011] 4 SLR 156 at [76].

80 [2008] 4 SLR(R) 150.

81 Cap 254, 1997 Rev Ed.

82 Cap 254, 1997 Rev Ed.

39 The Chief Assessor justified his decision based on the policy of discouraging land hoarding in land-scarce Singapore. CDL argued that the Chief Assessor had acted unfairly in exercising his discretion, and had acted *ultra vires* in having regard to wider planning considerations when determining the annual value of the subject property. The Court of Appeal affirmed the decision of the High Court below,[83] but elaborated on two further points: (a) whether the adoption of the policy of discouraging property developers from land hoarding in land-scarce Singapore was irrational; and (b) whether the distinction drawn between homeowners and property developers was irrational. It is necessary to consider these in turn.

*(1) The first issue – Whether adopting the policy against land hoarding was irrational*

40 CDL argued that the Chief Assessor had "acted *ultra vires* as he was not only factoring in *irrelevant considerations* but was also neither empowered nor equipped to deal with such considerations, which fell within the ambit of other relevant government agencies" [emphasis added].[84] The court acknowledged that there "were effectively only two ways in which CDL could challenge the Chief Assessor's exercise of discretion … *viz*, that the Chief Assessor had either acted illegally, or he had acted irrationally, in adopting the policy of discouraging land hoarding".[85] However, immediately after this, the court went on to say that "[e]ither way, both hurdles would have been difficult to overcome even though CDL did not mount the argument of illegality".[86] This is bewildering, as CDL had *indeed* argued that the Chief Assessor had factored in irrelevant considerations. It appears therefore that the court located review for irrelevant considerations (part of *illegality* review) under the umbrella of *irrationality* review.

41 This is further evidenced by the conclusion of the Court of Appeal regarding issue (a). After considering that the policy was based on "a very commonsensical notion"[87] of preventing land hoarding in Singapore and had in fact received judicial recognition in several other cases,[88] the court concluded that:[89]

> … the policy of discouraging land hoarding could not be said to be an *irrelevant consideration* for the Chief Assessor, and adopting such a policy was not *irrational*. [emphases added]

83 *City Developments Ltd v Chief Assessor* [2008] 2 SLR(R) 397.
84 *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150 at [8].
85 *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150 at [9].
86 *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150 at [9].
87 *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150 at [11]
88 *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150 at [13]–[15].
89 *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150 at [17].

42 The conflation inherent in the previous two cases – *Venice-Simplon* and *Lim Mey Lee Susan* – therefore seems to rear its head again in *City Developments*. However, this is not all.

*(2) The second issue – Whether the distinction drawn between homeowners and property developers was irrational*

43 Regarding issue (b), the court went on to consider that the distinction (between homeowners and property developers) was "wholly consistent with the general policy of discouraging as well as preventing land hoarding in land-scarce Singapore", concluding that "[t]here [was], in the circumstances, *nothing irrational (still less, illegal)* in the adoption of such a policy" [emphasis added].[90] What does this mean? It is suggested that "illegal" here cannot refer to a general sense of unlawfulness, since an irrational decision does not have some kind of *higher* standard of unlawfulness – it is simply unlawful. In the alternative, the preferable view is that by "illegal" here the court is referring to review for illegality, and accordingly, it seems to view illegality as a lower standard of review than irrationality – or perhaps a lower standard of unreasonableness. As shall be seen in the next section, this is a problematic conception of both heads of review.

44 For the sake of completeness, it should also be noted that the doctrinal conflation has not been helped by the inconsistent case law of the courts. There are three decisions of the High Court[91] in the intervening years between *Venice-Simplon* (decided 16 March 1995) and *Lim Mey Lee Susan* (decided 26 May 2011) where the courts have adopted the orthodox form of "irrationality" review: *Re Wong Sin Yee*,[92] which has already been discussed; *Kang Ngah Wei v Commander of Traffic Police*;[93] and *Mir Hassan bin Abdul Rahman v Attorney-General*[94] ("*Mir Hassan bin Abdul Rahman*"). As a matter of authority, however, one is bound by the two Court of Appeal decisions discussed above – *Venice-Simplon* and *City Developments* – which cement the conflated position in Singapore law.

90 *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150 at [22].
91 Incidentally, all three cases were decided by the same judge, Tan Lee Meng J.
92 See paras 29–32 above.
93 [2002] 1 SLR(R) 14. Strictly speaking, the word "irrationality" is not to be found in the judgment. That Tan Lee Meng J engaged in irrationality review, however, is implicit. The learned judge referred to *Wednesbury* unreasonableness (at [15]) and cites the excerpt of Lord Diplock's speech from *In re the Council of the Civil Service Unions* [1985] AC 374, which describes the test for irrationality review (at [16]).
94 [2009] 1 SLR(R) 134.

### *D. Implications for administrative law in Singapore*

45 In the previous sections,[95] the following developments were observed in the case law. First, the courts have been reluctant to introduce *proportionality* review in Singapore administrative law. Second, *irrationality* review, on the other hand, has been adopted as a standard of substantive review that is context-sensitive. Third, in its application of irrationality review, the courts have conflated the doctrines of *irrationality* with *illegality*; in particular, the test of relevancy of considerations has supplanted, or at least become an alternative to, *Wednesbury* unreasonableness. Fourth, in conflating the ideas of *illegality* and *irrationality*, the courts seem to conceive of *illegality* as requiring a lower level of unreasonableness than *irrationality*; in other words, they are seen as two discrete points on a sliding scale of unreasonableness. With this brief summary in place, this section shall proceed to discuss the implications of these developments on Singapore administrative law.

#### *(1) Irrationality and illegality permit different degrees of remedial discretion for the decision-maker*

46 As discussed earlier, the courts have conflated the tests for *irrationality* and *illegality*. Specifically, where a decision-maker has taken into account irrelevant considerations, the court suggests that his decision is an irrational one. This is problematic. Where a decision-maker is found to have taken into account an irrelevant consideration, the decision is quashed by way of *certiorari*, but he is allowed to reconsider his decision *without* the *irrelevant* consideration taken into account (or *mutatis mutandis*, *with* the *relevant* consideration taken into account). Crucially, however, he is allowed to attach weight to the various factors before him and might possibly arrive at the same decision again: that is, the one that was originally quashed by way of *certiorari*. The English case of *Padfield v Minister for Agriculture*[96] is a good example of this.

47 Milk producers in the UK had to sell milk to the Milk Marketing Board at prices that differed from region to region according to the cost of transporting milk from producers to the consumers. Certain milk producers were unhappy with the differential they had been allocated and complained to the Minister, asking him to appoint a committee to investigate the matter as provided by statute. The Minister refused to consider their complaint. On the facts, the Minister's decision was quashed by the House of Lords because he took into account irrelevant considerations, *inter alia*, the fact that he might be found in

95 See paras 25–44 above.
96 [1968] AC 997.

an embarrassing situation if he had to later give effect to the finding of the committee – ostensibly an irrelevant consideration. However, the matter was remitted to him to reconsider. Subsequently, even though he took the relevant factors into account, he still came to the same decision. The applicants' complaint was not heeded – the Minister did not direct the Milk Marketing Board to act on the committee's findings, on the basis of other policy reasons beyond the scope of the committee's inquiry. In short, even though he had taken the relevant considerations into account, which included the opinion of the committee of investigation, he was still entitled to weigh up the various considerations before him, ultimately arriving at the same decision as before.

48 Contrast the scenario where a decision-maker's decision is quashed for irrationality. Here the discretion available to him is far more severely curtailed: first, he cannot possibly arrive at the same result again – it is so unreasonable that no reasonable authority could possibly come to it; and second, he might not have the same discretion to weigh up the various factors before him. Indeed, where the decision made is binary (that is, "yes" or "no"), he does not have any residual discretion at all. As such, the doctrinal confusion of illegality and irrationality is undesirable, as it unnecessarily curtails the residual discretion of the decision-maker. For example, where he has taken into account an *irrelevant consideration*, his decision is struck down by the Singapore court as *irrational*, and he cannot possibly arrive at the same result again.

### *(2) Illegality and irrationality are not different degrees of the same unreasonableness*

49 It was also observed from dicta of the Court of Appeal in *City Developments* (regarding issue (b)) that the Singapore courts view illegality and irrationality as two degrees of unreasonableness on the same continuous sliding scale. It was discussed earlier[97] that illegality and irrationality are two separate senses of unreasonableness, but it is submitted that it would be misguided to view them as two different *degrees* of the same unreasonableness. Indeed, this is a thoroughly unhelpful conception. Rather than guarding against varying degrees of unreasonableness, they guard against different *forms* of it – different forms of "mischief" by the decision-maker, if you like. De Smith clarified irrationality review as follows:[98]

> The issue under this ground of review ['irrationality'] is not whether the decision-maker strayed outside the terms or authorised purposes of the governing statute (the test of 'illegality'). It is whether the power

97 See paras 18–23 above.

98 Lord Harry Woolf, Jeffrey Jowell & Andrew Le Sueur, *De Smith's Judicial Review* (Sweet & Maxwell, 2007) at para 11-003.

> under which the decision-maker acts, a power normally conferring a broad discretion, has been improperly exercised or insufficiently justified. The court therefore engages in the review of *the substance* of the decision or its *justification*. [emphases in original]

50 Therefore, to conflate irrationality and illegality as different degrees of the same administrative unreasonableness is to miss the point. Such a conflation empties the doctrine of irrationality of any content – of its job of reviewing the justifications behind an administrative decision. In its place remains a standard of review for a more generic, amorphous form of unreasonableness or administrative *ultra vires*, albeit of a "severer" degree than illegality.

51 Furthermore, this conception is unhelpful as irrationality is a context-dependent standard of review, as discussed above.[99] Illegality, on the other hand, is more "monolithic", to borrow Sir John Laws' language, and is wholly dependent on the empowering legislation from which the *vires* of the decision-maker is derived. Indeed, the "safety net"[100] nature of irrationality makes it hard to even quantify (or measure) the level of unreasonableness required, let alone the level of unreasonableness required relative to illegality review.

*(3) Illegality and irrationality focus on different aspects of the administrative decision*

52 Once it is realised that the doctrines of illegality and irrationality are fundamentally different schemes for the review of administrative acts, it becomes readily apparent that the tests for illegality and irrationality focus on fundamentally different aspects of the administrative decision. Illegality review focuses on the statutory regime (or the empowering legislation) from which the decision-maker derives his *vires*. The court, in interpreting the statute, determines the purpose behind the statutory power and the (relevant) factors that the decision-maker needs to take into consideration. Therefore, to couch it differently, illegality review looks at the *input* of the decision-making process: was the administrator loyal to the statutory regime when making his decision?

53 Contrariwise, irrationality review focuses on the *substance* of the decision *itself*. The court considers whether the decision made by the administrator has been adequately justified. In other words, it looks at the *output* of the decision-making process: was the administrator's decision beyond the range of reasonable responses permissible? The

99 See paras 8–13, and especially the text accompanying n 22 above.

100 Paul Craig, *Administrative Law* (Sweet & Maxwell, 2008) at para 17-002. See further paras 18–23 above.

court has a bit more freedom to review various aspects of the decision – the result (or outcomes) *itself*, as well as the justifications put forward by the decision-maker. It must be stressed, however, that despite this freedom, the standard of *Wednesbury* unreasonableness is a high one. Viewed this way, it is clear that the test for illegality is logically anterior to irrationality review – yet another reason to impugn their conflation.

54 It is admitted, however, that though this conceptual distinction is easy to draw in theory, it is much harder to do so when dealing with concrete cases in practice. Indeed, the theoretical basis behind the test for irrationality as it is currently conceived is obscure and inadequate (see below), and at worst it seems little more than a high standard of unreasonableness that is triggered by the "elephant test" – it is hard to describe, but you know it when you see it. However, if we agree with Hickman's thesis that *Wednesbury* unreasonableness originated from damages cases in the law of tort, perhaps a robust structure of irrationality review could be developed analogously with established principles of tort law.[101]

*(4) The inadequacy of the* Wednesbury *formulation*

55 It is suggested that the deficiencies of the *Wednesbury* test might have inadvertently compelled the Singapore courts to conflate the doctrines of irrationality and illegality in two ways.

56 A finding of irrationality is a severe one. In essence, the courts are saying that the administrative decision-maker has exceeded the range of reasonable responses open to him. Indeed, it could be seen as a severe indictment of the decision-maker *himself* as "more unreasonable than a reasonable public authority", which has consequences for comity. It is not inconceivable, therefore, that such considerations motivated the courts to adopt a different formulation of the test for irrationality – a test that was subtler and more nuanced. Unfortunately, however, in opting for the test for relevancy of considerations, the courts have conflated illegality review with irrationality review.

57 Second, the tautologous nature of the *Wednesbury* formulation lacks transparency. Indeed, this also provided an impetus for the

101 Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing, 2010) ch 7, especially para 195-212. This suggestion needs far more development, but perhaps *Wednesbury* unreasonableness could be developed along the lines of the "breach" stage in the tort of negligence inquiry (the other stages being "duty of care", "causation" and "remoteness of damage": *Clerk & Lindsell on Torts* (Sweet & Maxwell, 19th Ed, 2006) at para 8-04).

adoption of the more structured proportionality test in the UK. As Jowell and Lester have remarked:[102]

> The incantation of the word 'unreasonable' simply does not provide sufficient justification for judicial intervention. Intellectual honesty requires a further and better explanation as to *why* the act is unreasonable. The reluctance to articulate a principled justification naturally encourages suspicion that prejudice or policy considerations may be hiding underneath *Wednesbury*'s ample cloak. [emphasis in original]

58 A similar process might have taken place in Singapore, albeit with a different outcome. Feeling this same constraint as their UK counterparts, but reluctant to adopt the intrusive proportionality test, it is possible that the Singapore courts saw the test for relevancy of considerations as a more transparent and structured alternative with which to justify a finding of irrationality. Notwithstanding the inadequacy of the *Wednesbury* formulation, however, it must be questioned whether the conflation of the tests of relevancy and irrationality is beneficial.

*(5) Whither substantive review?*

59 Ultimately, the crucial question is whether there is any *true* substantive review in Singapore administrative law. Do the judges actually engage in the review of the substance or justification of a decision when it is indeed challenged on such grounds?

60 The analysis above reveals that irrationality review has become conflated with illegality review. Though beyond the doctrinal theorising, this conflation has significant consequences in practice. Out of the 79 cases of judicial review from 1957 to 2010 in Singapore,[103] there have only been two successful findings of irrationality, and in both instances there was already a corresponding finding of illegality. The first case, *Venice-Simplon*, was discussed above[104] as an instance of the conflation between reviews of illegality and irrationality in Singapore. In the second, *Mir Hassan bin Abdul Rahman*, although Tan Lee Meng J had already held that the decision-maker had acted *ultra vires* the statute,[105] he went on (perhaps needlessly) to consider irrationality review. Unsurprisingly, he held the decision to be irrational but offered no justification for his finding other than that the decision-maker had

102 Jeffrey Jowell & Anthony Lester, "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] PL 368 at 372.

103 See Annex A of Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469.

104 See paras 33–44 above.

105 *Mir Hassan bin Abdul Rahman v Attorney-General* [2009] 1 SLR(R) 134 at [20].

acted "beyond its mandate"[106] – namely, that he had acted *ultra vires*. This suggests that illegality review occupies the field and irrationality review is curtailed; accordingly, so is the review of the *substance* or *justification* of the administrative decision. Irrationality has become a blunt tool, a mere slogan to add to a finding of illegality – perhaps to designate a more flagrant breach of illegality, whatever that might entail.

61 Coupled with the reluctance of the courts to adopt proportionality review, the cumulative result is that little is done in Singapore administrative law by way of *substantive* review. Instead, substantive review has been masquerading under the guise of illegality or, specifically, the test of relevancy. Substantive review, therefore, remains undeveloped. Indeed, though the courts may use the language of irrationality in cases where administrative acts are challenged on those grounds, it is doubtful as to whether any *true* substantive review takes place. In the next section, possible explanations for this current state of the law shall be considered.

## IV. Judicial deference and substantive review

62 As rightly acknowledged by the then Chief Justice Chan Sek Keong, judicial review is "a function of socio-political attitudes in a particular community".[107] Principles of administrative law are developed when courts "[step] into the constitutional vacuum"[108] to protect the rights of citizens before their Government. So it is with substantive review. With the analysis of the preceding sections of this article in mind, it would be apposite now to examine the sociopolitical attitudes – in particular, the *judicial* attitudes – towards judicial review in our democratic polity.

63 It has been submitted that the Singapore courts are reluctant to engage in substantive review. They do not see it as their place to review an administrative decision for its *substance*, thereby according the administrator more leeway in his decision-making process. Three explanations might be proffered. First, it is suggested that there does not yet exist a "constitutional vacuum" necessitating the development of a more robust substantive review jurisprudence by the Singapore courts. Contrast the UK where pressures from Europe and the enactment of the Human Rights Act 1998 proved to be catalysts for the adoption of the more intrusive proportionality review. The Singapore Judiciary has yet to experience a similar form of constitutional pressure, either internally

106 *Mir Hassan bin Abdul Rahman v Attorney-General* [2009] 1 SLR(R) 134 at [26].

107 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at [28].

108 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at [28].

(from the *demos*, for example) or externally (from the Association of Southeast Asian Nations, for example).

64 Second, this reluctance could be a function of the exceptional nature of the judicial review remedy in Singapore. It is standard practice for public authorities in Singapore to seek the advice of the Attorney-General's Chambers on the legality of their actions before implementing policies that impinge on the rights of individuals. As Chief Justice Chan recognised:[109]

> With a centralised advisory body advising the Government, fewer wrong decisions are made, and fewer decisions are vulnerable to judicial review on the grounds of illegality, procedural impropriety or breach of natural justice.

65 Due to this self-checking procedure, it is probable that the courts, for considerations of comity, think twice before reviewing an administrative decision on the basis of its substance; especially when it is to impugn it as being *Wednesbury* unreasonable. The Chief Justice also went on to rely on Harlow and Rawlings'[110] "green light" or "red light" conceptions of administrative law, suggesting perhaps that Singapore administrative law resembles more closely the former. On such a "green light" view of administrative law, it is said:[111]

> [The courts are not the] first line of defence against administrative abuses of power: instead, control can and should come internally from Parliament and the Executive itself in upholding high standards of public administration and policy.

66 In short, therefore, this institutional convention – that judicial review is an exceptional form of redress – may have stymied the development of substantive review in Singapore.

67 While the above two factors go some way in explaining the apparent reluctance of the courts to substantive review, this is still an incomplete picture. These factors elucidate the constitutional setting in which administrative decisions take place, but do not explain why the judges fail to engage in substantive review in those concrete cases that come before them – that is, they are insufficient to understand the adjudication process *itself*. It is therefore submitted that a third explanation is necessary: the notion (or doctrine) of judicial *deference*.

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109 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at [15].

110 Carol Harlow & Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd Ed, 2009) ch 1, especially at pp 22–48.

111 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at [29].

68 Notwithstanding the disagreement over whether deference should be recognised as a standalone doctrine of administrative law,[112] the term is "generally used in a fairly loose way to describe a range of judicial techniques which have the effect of increasing decision-makers' latitude".[113] Elliott, in a principled exposition of the subject, explained that there are two principal grounds on which deference is often exhibited. The first he calls "expertise-based deference", where "a court may defer to a decision-maker's superior expertise in relation to certain matters".[114] For example, a judge may deem it appropriate to ascribe more weight to the findings of the Minister for Finance, where his decision to invest a certain sum of the national reserves is substantiated by numerous studies put together by an entire department of the Ministry's economists and statisticians. Fundamentally, this is a question of *relative institutional competence*: the decision-maker's superior expertise in the realm of mathematical calculations *versus* the court's limitations – both in terms of resources and expertise.[115] The second form of deference, he says, is legitimacy-based – deference "to a decision-maker in light of its superior democratic legitimacy".[116] Unlike expertise-based deference, deference on this second ground is underpinned by *normative* considerations rather than merely practical ones. Elliott explained:[117]

> [W]hereas expertise-based deference is a necessary evil, or is at least adopted for negative reasons based on the limitations of the court, legitimacy-based deference is exhibited (say its proponents) because it is normatively right that the decision-maker should, in certain circumstances, enjoy a degree of discretion.

112 See T R S Allan, "Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory" (2011) 127 LQR 96; and earlier by the same author, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 CLJ 671 (arguing against a separate doctrine of deference); Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126 LQR 222 (arguing in favour of a separate doctrine of deference).

113 Mark Elliott, "Proportionality and Deference: The Importance of a Structured Approach" in *Effective Judicial Review: A Cornerstone of Good Governance* (C F Forsyth, Mark Elliott & Swati Jhaveri eds) (Oxford University Press, 2010) at p 268.

114 Mark Elliott, "Proportionality and Deference: The Importance of a Structured Approach" in *Effective Judicial Review: A Cornerstone of Good Governance* (C F Forsyth, Mark Elliott & Swati Jhaveri eds) (Oxford University Press, 2010) at p 269.

115 Not least because lawyers are not the best at mathematics.

116 Mark Elliott, "Proportionality and Deference: The Importance of a Structured Approach" in *Effective Judicial Review: A Cornerstone of Good Governance* (C F Forsyth, Mark Elliott & Swati Jhaveri eds) (Oxford University Press, 2010) at p 269.

117 Mark Elliott, "Proportionality and Deference: The Importance of a Structured Approach" in *Effective Judicial Review: A Cornerstone of Good Governance* (C F Forsyth, Mark Elliott & Swati Jhaveri eds) (Oxford University Press, 2010) at pp 276–277.

69 Whether this latter form of deference is appropriate, however, is a controversial matter, not least because it is questionable whether democratic legitimacy is indeed relatively quantifiable as such.[118]

70 It is suggested that the judicial reluctance to engage in substantive review could also be attributed to a subtle development of judicial deference in Singapore administrative law jurisprudence. However, though a concept of deference – especially on grounds of relative institutional competence – is desirable for the maintenance of comity, a cautious approach is necessary. This article echoes Allan's view, that factors such as the decision-maker's relative expertise or democratic legitimacy are only "relevant in so far as they generate convincing arguments – good reasons for curtailing rights grounded in reasonable policies and supported by clear evidence".[119] Deference that is mere subservience to the credentials of a decision-maker without true consideration of the reasons given is but "non-justiciability dressed in pastel colours".[120] While Singapore administrative law does recognise a general doctrine of justiciability in certain public law fields,[121] it is a doctrine borne more out of pragmatism rather than principle. Allan's caution is therefore prescriptive in the Singapore context – should judges defer to the executive (or the administrator), they must do so for properly considered reasons, rather than a blanket preclusion of review just because the decision falls within a certain sphere of public law;[122]

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118 Consider the remarks of Lord Bingham in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [42]:

> It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true … that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is *wrong to stigmatise judicial decision-making as in some way undemocratic*. [emphasis added]

See also Jeffrey Jowell, "Judicial Deference: Servility, Civility or Institutional Capacity?" [2003] PL 592 at 597, where the author considered that "democratic principle" can no longer be equated with "majority approval".

119 T R S Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 CLJ 671 at 689.

120 T R S Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 CLJ 671 at 689.

121 National security is a good example. See *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525, cited with approval in *Re Wong Sin Yee* [2007] 4 SLR(R) 676 and discussed in paras 29–32 above. See also *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294. Contrast the position in the UK where the House of Lords in *A v Secretary of State for the Home Department* [2005] 2 AC 68, sitting as a panel of nine, emphatically denied that executive decisions in the national security context were inherently unreviewable.

122 This form of deference has been called "spatial deference" by Murray Hunt ("Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in *Public Law in a Multi-Layered Constitution* (Nicholas Bamforth & (*cont'd on the next page*)

this would be an "abdication of judicial responsibility for the protection of rights".[123]

## V. Conclusion

71 This article has sought to chart the development of substantive review in Singapore *vis-à-vis* that in the UK. It could be seen from the cases how Singapore law has taken a seemingly autochthonous route in its development, with the courts' reluctance to adopt proportionality review and the conflation of illegality and irrationality reviews. It was then suggested that these developments are but symptoms of a general reluctance on the part of the Singapore courts to engage in substantive review, explicable both by judicial attitudes towards judicial review and the constitutional setting in which such review takes place.

72 As with every comparative study in law, one must resist the urge to bluntly conclude that Singapore should "follow Mother England". Instead, one must ask "whether judge-made principles of administrative law are really just English law or whether they are truly common law principles of wider application that can be utilised and further refined by the judiciary in independent South-East Asian states with their quite different goals and priorities in national development".[124] Indeed, this autochthonous development of substantive review may be apposite for Singapore's specific constitutional setting. Unfortunately, however, space precludes the discussion of whether such a development is truly warranted. Such issues will hopefully be addressed in a future piece.

73 By way of addendum, two small proposals for reform will be made. The doctrinal conflation of illegality and irrationality should be discontinued. As discussed above,[125] both doctrines are conceptually distinct and are targeted at different facets of the administrative decision (input *versus* output). Moreover, the tests of irrelevant considerations and *Wednesbury* unreasonableness do not necessarily lead to the same remedial consequences. Even if the courts have decided to supplant the deficient *Wednesbury* formulation with a new test of irrelevant

Peter Leyland eds) (Hart Publishing, 2003) at p 339). He rejected this form of deference as it fundamentally makes the erroneous assumption that cases can be "neatly classified into categories according to the standard of review applied to them".

123 T R S Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 CLJ 671 at 689.

124 Christine Chinkin, "Abuse of Discretion in Malaysia and Singapore" in *The Common Law in Singapore and Malaysia* (Butterworths, 1985) at p 262; cited in Thio Li-ann, "The Theory and Practice of Judicial Review of Administrative Action in Singapore" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Academy Publishing, 2011).

125 See paras 45–61 above.

considerations, they should be explicit about such a development. With respect, such loose language is anathema to the development of a coherent public law.

74 It is also suggested that the courts eschew the language of illegality. Several issues other than *vires* can cause an administrative decision to be illegal (or, plainly, unlawful). Instead, the precise issue should be identified, be it *ultra vires*, irrelevant considerations or so on. It is hoped that such a development by the courts and practitioners alike will lead to improvements in doctrinal clarity – a precious commodity when public law rights are at stake.

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